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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	RM No. 9097
	)	
Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF DIRECTV, INC.

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DIRECTV, Inc. ("DIRECTV") respectfully submits these reply comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

The comments filed by the cable interests in this proceeding hearken back to 1992, when that industry mounted an intense lobbying effort against the program access law and its implementing rules. Now, as the Commission examines ways to fine tune its program access rules to better address the still-dominant market power of cable operators and their vertically integrated programming affiliates, the cable industry has revived many of the same arguments to advance positions that were expressly rejected by Congress and the Commission years ago.

Specifically, the most important issue being debated in this latest chapter of the "program access wars" involves the legal authority of -- and from a policy standpoint, the fundamental necessity for -- the Commission to rebuff strongly the efforts of cable operators to avoid the application of program access requirements through the strategy of "terrestrial evasion"

-- *i.e.*, causing programming that has been or would have been distributed by satellite to be distributed to cable operators using fiber optic cable, microwave, or some other terrestrial means, and then using the fact of that terrestrial distribution to justify refusing to sell such programming to alternative multichannel video programming distributors ("MVPDs").

In making their policy case for why the Commission should not address terrestrial evasion, the program access opponents once again point to their extensive investment in programming; to inherent rewards that should inure to a product developer; to the potential chilling effect of program access requirements on the development and distribution of local or regional programming; and to the possibility that exclusive contracts and other vertical restraints can be promote competition. However, these arguments were fully accounted for by Congress and the Commission when program access requirements were first enacted in 1992. The Commission has observed that, in the program access context, "Congress has clearly placed a higher value on new competitive entry than on the continuation of . . . practices that impede this entry."[1] This goal of promoting MVPD competition justifies "targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming."[2] Now, as in 1992, the cable industry commenters conveniently ignore the continuing ability and incentive of the incumbent cable operators to stifle MVPD competition by directly controlling or indirectly manipulating the supply of programming to their emerging competitors.

Of course, the threshold question in this proceeding is whether the Commission

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1 *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 3359, 3379-80 (1993) ("Program Access Order") (noting comments of NCTA, Liberty Media, and others concerned that exclusivity encourages the creation, promotion, and distribution of new programming).

2 *Id. (quoting* 1990 Cable Report, 5 FCC Rcd at 5031).

has the legal authority to address terrestrial evasion in the manner that sound public policy requires. On this score, DIRECTV and others have demonstrated in their opening comments that the Commission has ample legal authority to address terrestrial evasion at the present time, without any legislative amendment of the Communications Act, through any of several alternative means: (i) via a straightforward application of Section 628(b); (ii) via a broad interpretation of Section 628(c); or (iii) as a necessary ancillary function to its Section 628 and general authority. Except for those parties whose ultimate goal appears to be continued dominance of the MVPD market at the expense of emerging competition, most parties agree with DIRECTV that the Commission can and should act promptly to halt terrestrial evasion before it significantly undermines statutory program access protections.

II. THE PROGRAM ACCESS LAW REMAINS JUST AS VITAL TODAY AS IT WAS IN 1992

Contrary to one cable operator's assertion, program access protections were not deemed "bad policy"[3] in 1992, and adapting the Commission's program access rules to address new evasive tactics by cable operators and affiliated programmers is not "bad policy" today. Yet, cable industry commenters argue in this proceeding that clarifying the rules to explicitly cover terrestrial evasion or strengthening the program access complaint process will stifle program development and innovation[4] and reduce consumer choice by reducing economic incentives to invest in local or regional programming.[5]

The cable industry made similar arguments to Congress, and later to the

3 Comcast Comments at 11.

4 Cablevision Comments at 8, 11.

5 *Id.* at 2-3; Liberty Media Comments at 28-29; Comcast Comments at 12-13.

Commission, in 1992-93, urging them not to regulate exclusive agreements. These arguments were deemed outweighed by policies favoring the promotion of competition in the MVPD market, which ensure a diversity of video programming outlets.[6] Furthermore, despite the cable industry's predictions, the program access rules to date have not produced the feared chilling effect on the development of new, innovative local or regional programming. Nor is there any indication at all that strengthening program access enforcement as proposed in this proceeding will stifle the development of local or regional programming.

If anything currently threatens the diversity of local multichannel video outlets, it is the cable industry's collective partitioning of the American viewing public into regional clusters.[7] The marketplace trends of cable MSO consolidation and clustering foster increased concentration of major cable MSOs, enable these cable operators to coordinate their conduct,[8] and decrease MVPD competition by eliminating operators of adjacent cable systems as potential overbuilders.[9]

The NCTA is misleading in its implication that the Commission failed to identify

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6 *See, e.g.*, Program Access Order, 8 FCC Rcd at 3379-80, ¶¶ 50-52, (noting comments of NCTA and Liberty Media that exclusivity encourages the creation, promotion, and distribution of new programming).

7 As a dramatic example of the effect of clustering, the Wall Street Journal recently reported that in addition to turning into a "national programming powerhouse," "Cablevision has been rejiggering its assets in more than a dozen states during the past 12 months, in keeping with the industry trend of focusing on a few major markets. By the summer, Cablevision is projected to have 3.4 million subscribers in just 5 states, a change from 2.9 million subscribers in 19 states just one year earlier." *What's Behind Cablevision's Offbeat Buys?*, The Wall Street Journal (Feb. 9, 1998), at B1, B4.

8 *See OVS Second Report and Order*, 11 FCC Rcd 18223, 18322, ¶ 189.

9 Annual Assessment of the Status of Competition in Market for the Delivery of Video Programming, CS Docket No. 97-141 (released Jan. 13, 1993) ("1997 Report"), at ¶ 141.

access to programming as a disadvantage facing DBS operators in their attempt to compete against cable in its recent report to Congress on the state of competition in the MVPD marketplace.[10] The paragraph of the Commission's report that NCTA references lists not the Commission's concerns about DBS competitiveness, but those of consumers.[11] Indeed, that consumers failed to identify "access to desirable program networks" as an alternative MVPD disadvantage underscores the very point that DIRECTV and other alternative MVPDs have been urging all along -- consumers simply *expect* and take for granted access to certain programming from all MVPD alternatives. That is why the cable industry's power over this access remains a cause for such concern.

Strengthening the program access rules in the manner proposed does not amount to unjustified governmental assistance nor will it turn all programming into a commodity.[12] The focus of the program access law has always been on the market power of the incumbent local cable monopolies, which enables them to leverage their position in the upstream programming supplier market. Because cable operators across the country for the most part still do not face effective competition, and retain an 87 percent share of the MVPD market,[13] their monopoly-driven market power and influential control over the supply of programming without continuing Commission oversight and enforcement with respect to program access will simply cement cable's stranglehold over programming.

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10 *See* NCTA Comments at 2 ("The Report identifies certain problems and disadvantages that DBS operators may face in competing with cable operators -- *but access to desirable program networks is not one of them.*").

11 *See* 1997 Report at ¶ 57.

12 *See* Cablevision Comments at 3, 13; Liberty Media Comments at 28.

13 1997 Report at ¶ 11.

III. THE COMMISSION HAS THE AUTHORITY, AND RESPONSIBILITY, TO ADDRESS TERRESTRIAL EVASION THROUGH A NUMBER OF ALTERNATE APPROACHES

There is widespread agreement among virtually all parties but the cable operators in this proceeding that the FCC has the clear authority under Section 628(b), as well as other statutory provisions, to prohibit conduct that emerges as a barrier to MVPD competition, including the diversion of "satellite cable programming" to terrestrial facilities.[14] The FCC should reject the attempts of cable operators and their affiliates to argue otherwise. A contrary conclusion would render the program access law a dead letter, and Congress' guarantee of non-discriminatory access to programming for alternative MVPDs an empty promise.

A. Section 628(b) Provides Explicit Authority For The FCC To Address Terrestrial Evasion

In order to bring a complaint under Section 628(b), an aggrieved MVPD must show that (i) a cable operator or vertically integrated program vendor; (ii) has engaged in "unfair methods of competition" or "unfair or deceptive acts or practices"; (iii) the purpose or effect of which is to hinder significantly or to prevent that MVPD from providing satellite cable programming to its subscribers.[15] The cable industry does not seriously take issue with the fact that terrestrial evasion can have the purpose, and certainly has the effect, of precluding MVPD competitors and their customers from gaining access to satellite cable programming.[16] Instead,

14 *See, e.g.*, Ameritech Comments at 24; Bell Atlantic Comments at 9; BellSouth Comments at 19; Consumers Union Comments at 4-10; Echostar Comments at 12-15; GE Americom Comments at 6-10; NRTC Comments at 16-18; RCN Telecom Comments at 12-17; SNET Personal Vision Comments at 5; Wireless Cable Assoc. Comments at 19-25.

15 *See* 47 U.S.C. § 548(b).

16 Indeed, two cable parties, Time Warner and Liberty Media, appear to acknowledge implicitly the Commission's authority to address evasive practices when programming is moved from satellite to terrestrial distribution. They point out only that, in their view, "[t]here is and can be no issue regarding program services that are distributed terrestrially

several cable commenters argue that, as a threshold matter, the practice is not "unfair."[17] That claim is without merit. The statute clearly delegates to the Commission the authority to determine via rule or adjudication whether practices in which cable operators or vertically integrated programmers engage are unfair or anticompetitive. Furthermore, there is no question that terrestrial evasion can and should be classified as an anticompetitive practice.

1. Congress Clearly Entrusted The Commission To Determine "Unfair Methods Of Competition Or Unfair Or Deceptive Acts Or Practices"

A key issue before the Commission in this proceeding is whether diverting satellite-delivered programming to a terrestrial-based system and then refusing to sell to an MVPD competitor or class of MVPDs constitutes an "unfair method[] of competition" or an "unfair or deceptive act[] or practice[]." Contrary to the cable industry's assertions,[18] Congress clearly conferred authority upon the Commission to decide this precise issue.

Section 628 does not attempt to define the terms "unfair methods of competition" or "unfair or deceptive acts or practices." Instead, Congress clearly intended the FCC to have broad interpretive powers to determine which activities are encompassed within the statutory prohibition. The legislative history is instructive:

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ab initio." Time Warner Comments at 8; *see* Liberty Media Comments at 24-25 ("Regardless of how the Commission decides the question of its potential evasion authority, it is clear that the Commission has absolutely no authority to impose the program access restrictions on services that have *always* been distributed via non-satellite means."). This is certainly not true for Section 628(b) actions. If the use of terrestrial transmission can be shown to have a primary purpose of avoiding program access requirements, and the programming at issue *otherwise would have been* distributed via satellite, then such conduct could be reached as an unfair practice under Section 628(b), because it would have the "purpose or effect" of denying alternative MVPDs and their subscribers access to satellite-delivered programming.

17 *See* Cablevision Comments at 17; NCTA Comments at 16.

18 *See* Cablevision Comments at 16-17.

> [T]he conferees *expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies*. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.[19]

Congress therefore granted the FCC wide latitude to enforce the statutory prohibition against unfair business conduct restricting program access in the MVPD marketplace.

The broad power granted to the FCC to declare certain practices "unfair" is analogous to the extensive authority of the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, which utilizes identical terminology.[20] Courts have found that Congress's use of the general term "unfair," without qualification, is intended to render broad, flexible authority to the FTC, so that the agency can "cope with new threats to competition as they arise."[21] The Supreme Court established long ago that the FTC, in its policing of "unfair" conduct, "considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[22]

Like the FTC, the FCC in carrying out its mission plainly is not bound by

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[19] H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 93 (Sept. 14, 1992) ("Conference Report") (emphasis supplied).

[20] *See* 15 U.S.C. § 45; *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-22 (1966).

[21] *See E.I. DuPont de Nemours v. FTC*, 729 F.2d 128, 136, 137 (2d Cir. 1984). Thus, the "specific practices that might be barred were left to be defined by the Commission, applying its expertise, subject to judicial review." *Id.* at 136.

[22] *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244 (1972); *see also DuPont*, 729 F.2d at 136-37 ("[The FTC] may bar incipient violations of [the antitrust laws], and conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit.").

established antitrust principles, and indeed, the policy framework of the program access law extends well beyond the limits of antitrust enforcement. The Commission already has noted that Section 628 is

> a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.[23]

And contrary to the cable industry's arguments that the FCC should not be assessing the spirit of the statute,[24] Congress clearly contemplated that considerations of fairness would be dictated by the broader policy considerations attending the promotion of competition to incumbent cable operators. Furthermore, given the FCC's broad power to determine what constitutes an unfair practice, courts must accord the Commission's determination a high degree of judicial deference.[25]

2. <u>**The Commission Should Declare "Terrestrial Evasion" An Unfair Practice Or Method of Competition**</u>

Those commenters opposing Commission oversight and prevention of terrestrial evasion claim that even if the FCC has the power to review the diversion of satellite cable programming to terrestrial delivery modes under Section 628(b), there is nothing "unfair" about

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23 *Program Access Order*, 8 FCC Rcd at 3374, ¶ 41 (emphasis supplied); *see OVS Third Report and Order*, 11 FCC Rcd 20227, 20300, ¶ 169; *OVS Second Report and Order*, 11 FCC Rcd 18223, 18320, ¶ 186.

24 NCTA Comments at 13.

25 *See People of the State of California v. FCC*, 75 F.3d 1350, 1364-65 (9th Cir. 1996) ("An agency's interpretation of a statutory provision . . . it is charged with administering is entitled to a high degree of deference.").

that conduct.[26] These parties contend that an otherwise lawful practice -- the use of terrestrial facilities to distribute vertically integrated cable programming -- does not become unlawful simply because it removes a programming service from Section 628's reach.

Such claims, however, simply ignore the entire context of the prohibition contained in Section 628(b), as well as the intent of Congress in enacting it. The Commission rightly has already determined "unfair practices" to be those that generally "inhibit the development of multichannel video distribution competition,"[27] and function as a "barrier[] to competition" or an "obstacle[] to the broader distribution of satellite cable . . . video programming."[28]

By this definition, the diversion of satellite-delivered programming to terrestrial delivery facilities and a concomitant refusal to sell that programming to an alternative MVPD or a class of MVPDs is *exactly* the type of anticompetitive behavior that Congress intended to prohibit. From the earliest versions of the 1992 Cable Act, Congress clearly contemplated the unfairness and anticompetitive effect of such evasive tactics, regardless of the delivery mode employed:

> Another example of a practice that might significantly impede competition is where a vertically integrated programmer were to *create a new exclusive service that diverted extensive programming from any previously non-exclusive service.*[29]

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26 Cablevision Comments at 17; NCTA Comments at 15. Though the cable operators claim that terrestrial delivery can be the most cost effective delivery mechanism, DIRECTV agrees that the Commission should remain skeptical about the legitimacy of the cost rationale. *See* Echostar Comments at 12.

27 Program Access Order, 8 FCC Rcd at 3373, ¶ 40.

28 *Id.* at 3374, ¶ 41.

29 H.R. Rep. No. 102-682, 101st Cong., 2d Sess. 104 (Sept. 6, 1990) (emphasis supplied).

DIRECTV is facing a situation in Philadelphia that matches this scenario. Comcast, the nation's fourth largest MSO, bought majority ownership interests in three Philadelphia regional sports teams, and then diverted programming formerly delivered by satellite and subject to the program access requirements to a newly-created service, which it now has offered exclusively to cable operators and other select land-based MVPDs. By foreclosing DIRECTV and all other DBS providers from Philadelphia regional sports programming for which access was previously required by the program access rules, Comcast has diverted extensive programming from a previously non-exclusive satellite-delivered service to a new terrestrial-exclusive service. The result of this diversion is to reduce American consumers' choices when it comes to viewing Philadelphia regional sports programming, and, in particular, the choices of DIRECTV subscribers in the Philadelphia area. Comcast's actions have both the purpose and effect of weakening DIRECTV as a regional competitor to Comcast's cable operations. Over time, such practices -- particularly if they become widespread -- could significantly affect DIRECTV as a national competitor as well.

Such evasive tactics typify an "unfair" competitive practice that seeks to end-run the pro-competitive requirements of Section 628. Anticompetitive intent behind the questionable conduct could be evidenced by statements of a cable operator indicating that the conduct was part of an attempt to "corner the market"[30] or otherwise lock up the supply of programming. And even beyond an inquiry into anticompetitive intent, the anticompetitive effect of such evasion will nearly always be apparent -- the frustration of emerging MVPD competition as previously or

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30 *See* The New Establishment -- Vanity Fair's Fifty Leaders of the Information Age, Vanity Fair, October 1997, at 166 (interview with Brian Roberts, President of Comcast Corporation).

otherwise intended satellite-delivered programming is no longer available "to subscribers or consumers."[31] The Commission can and should find that terrestrial evasion clearly subverts the Congressional intent underlying Section 628 and that it is actionable as an "unfair" practice.

B. The Commission Can Also Address Terrestrial Evasion Through A Broad Interpretation Of Section 628(c)

Aside from Section 628(b)'s applicability, as DIRECTV and others have pointed out, a broad interpretation of Section 628(c)[32] would independently justify Commission action against terrestrial evasion.[33] Unlike Sections 628(b), Section 628(c)'s application hinges on the proper scope of the term "satellite cable programming."[34] Employing the traditional tools of statutory construction, the Commission can and should interpret the term "satellite cable programming" as encompassing programming diverted off-satellite in order to evade the program access requirements.

First, the policies at stake do not differ depending upon the distribution mode. Cable operators can exercise market power over programming in the upstream market without regard to whether the programming is distributed by satellite, microwave or fiber optic cable.

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31 47 U.S.C. § 628(b).

32 Specifically, terrestrial evasion should be found to violate the requirements of Section 628(c)(2)(A) and (B). *See* 47 U.S.C. § 548(c)(2)(A) and (B).

33 *See* DIRECTV Comments at 18-23; *see also* Echostar Comments at 13 (explaining that formerly satellite-delivered programming or programming contained in a satellite feed for out-of-market distribution should be construed as "satellite cable programming," because "'transmitted by satellite' is not limited in terms of when the transmission occurred or who effected it").

34 *See* 47 U.S.C. § 548(i)(1) (defining "satellite cable programming" by reference to Section 705 of the Communications Act as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers"); 47 U.S.C. § 605(d)(1).

Where programming is unfairly or anti-competitively withheld from distribution, MVPD competition is impeded "regardless of the method of delivery."[35] Section 628 demonstrates not only Congress' deep concern with the cable industry's 'stranglehold' over programming, but also a rebuff of diversionary tactics. An unduly narrow construction of the term "satellite cable programming" would wholly undermine the intent of Congress[36]

Second, as DIRECTV has pointed out previously, there is clear precedent for the Commission to construe the term "satellite cable programming" broadly. The Second Circuit, for example, found that the term could encompass unauthorized interception of cable transmissions over coaxial cable (*i.e.*, pure terrestrial distribution).[37] And, the Commission has already interpreted the "satellite cable programming" definition flexibly to include programming intended for open video systems.[38] Interpreting the term broadly to encompass programming that has been diverted from satellite distribution is warranted and would effectuate Congressional intent.

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35 Letter from William E. Kennard to the Honorable W.J. (Billy) Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection (Jan. 23, 1998) at 7 ("Kennard Letter").

36 *See American Scholastic TV Programming Foundation v. FCC,* 46 F.3d 1173, 1178 (D.C. Cir. 1995) (looking beyond "superficially-clear" blanket textual prohibition after reviewing the design, structure and legislative history).

37 *International Cablevision, Inc. v. Sykes*, 75 F.3d 123, 131-32 (2d. Cir.), *cert. denied sub nom. Noel v. Int'l Cablevision,* 117 S.Ct. 298 (1996). *But see United States v. Norris,* 88 F.3d 462, 468 (7th Cir. 1996). While Cablevision discusses *Norris* at great length in its comments, it fails to reference the explicit authority to the contrary. *See* Cablevision Comments at 15 n.23.

38 *OVS Second Report and Order*, 11 FCC Rcd at 18317, ¶ 180.

C. The Commission Can Address Terrestrial Evasion Through Its Section 4(i) Authority

Even aside from subsections 628(b) and (c), the Commission's "expansive powers"[39] under the Communication Act's "necessary and proper" clause in Section 4(i) provides another basis to refute cable operators' incorrect view that they can successfully evade program access requirements through terrestrial delivery.[40] Halting the evasion of the program access requirements is both consistent with the statutory scheme and necessary to the FCC's execution of its Section 628 and general responsibilities.

By enacting Section 628, Congress sought to shield emerging MVPD competitors from potential anticompetitive behavior by a dominant cable industry capable of exerting market power and control over the supply of programming. The statutory scheme accomplishes this purpose by conferring upon the FCC powerful supervisory authority over competitive behavior in the MVPD marketplace through its enforcement of Section 628. Section 4(i) in turn authorizes the Commission "to deal with aligned activities which may affect the regulatory system entrusted to the agency."[41]

If cable operators capable of exerting market power have the ability to exempt themselves from program access requirements simply by altering their delivery mode to a method made more feasible through the industry's rapid and extensive consolidation and regional

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39 *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir 1988) (*quoting NBC v. United States*, 319 U.S. 190, 219 (1943)).

40 *See* Ameritech Comments at 25-26; Consumers Union Comments at 3, 5-6; GTE Comments at 8-9; RCN Telecom Comments at 16; Wireless Cable Assoc. Comments at 23-24.

41 *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 225 (D.C. Cir. 1967).

clustering, they could effectively eviscerate all program access protections. If terrestrial evasion is allowed to proceed unabated, it could easily present realistic dangers of hampering the entire program access law and regulatory scheme.[42] Thus, it becomes imperative for the Commission to prevent the flood of previously-accessible programming into sheltered cable-only systems.

The Commission has "expansive powers" to respond to "developing problems to which it was directed."[43] And the Supreme Court has confirmed that the Commission's broad power under Section 4(i) to adapt its enforcement of Communications Act requirements to keep pace with technological developments in the dynamic communications industry[44] -- developments such as the expansion and use of terrestrial delivery.

In addition, the Commission is accorded "substantial deference" by courts, even when assessing what is necessary under Section 4(i) for the execution of its regulatory responsibilities.[45] Specifically, as the Seventh Circuit has explained:

> Section 4(i) empowers the Commission to deal with the unforeseen -- even if it [sic] that means straying a little way beyond the

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42 *See Buckeye*, 387 F.2d at 224; *cf. American Trucking Assoc. v. United States*, 344 U.S. 298, 311 (1953) (holding that Interstate Commerce Commission could regulate practices not mentioned in the Act which may directly frustrate the success of the regulatory scheme).

43 *NBC v. United States*, 319 U.S. 190, 219 (1943); *see FTC Communications v. FCC*, 750 F.2d 226, 232 (2d Cir. 1984); *Metropolitan Television Co. v. FCC*, 289 F.2d 874, 876 (D.C. Cir. 1961).

44 *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). *See also Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 480-81 (2d Cir. 1971) (upholding Commission's authority to regulate television prime time access despite no explicit grant of authority in the Act).

45 *See GTE Service Corp. v. FCC*, 474 F.2d 724, 730-31 (2d Cir. 1973) (despite no explicit mention of computers or data processing in the Communications Act, the Commission's broad rule-making authority under 47 U.S.C. §§ 151 & 154(i) extended to data processing activities of common carriers that "pose, in the view of the Commission, a threat to efficient public communications services at reasonable prices").

apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries.[46]

The power that the Commission could assert over terrestrial evasion strategies is one that has explicitly been conferred upon the Commission under Section 628(b). Even if Congress's command had been uncertain, however, the Commission's assumption of power over evasion of program access provisions with which it has been entrusted would not contravene any other provision of the Act, and would be far less reaching than the power that the Commission has been allowed to exercise in the past under its implied ancillary jurisdiction. Once again, the Commission has the power and statutory mandate to address terrestrial evasion.

D. The Cable Industry's Assertions Regarding the Cable Act's Legislative History Are Utterly Speculative and Contravene the Intent of the Act

Cable commenters who urge the Commission to sit on the sidelines and watch MSOs divert satellite cable programming to terrestrial facilities in their growing respective regional clusters claim support for their position from the legislative history of the 1992 Cable Act. Specifically, these commenters claim that "[t]he legislative history of section 628 reinforces the view that Congress *expressly* chose to exclude terrestrial programming from the program access requirements."[47] Unlike the House version that was enacted with minor modifications, the Senate's version of Section 628 applied to "national and regional cable programmers, that is, programmers which license for distribution to more than one cable community."[48] According to the cable industry, because Congress enacted the House version of Section 628, which contained

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46 *North American Telecommunications Assoc. v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985).

47 Cablevision Comments at 15 (emphasis supplied); *see* NCTA Comments at 13-14.

48 S. Rep. No. 102-92 at 28 (1991).

the definition of "satellite cable programming," and not the Senate version that focused in a technology-neutral manner on affiliated video programmers licensing video programming for national or regional distribution, Congress allegedly "clearly contemplated, but rejected, applying the program access law to non-satellite delivered programming distributed on a regional basis."[49]

The distinction that the incumbent cable monopolists attempt to infer between satellite-delivered national programming (that Congress allegedly intended to cover under the statute) and terrestrially-delivered local or regional programming (that Congress allegedly intended to exclude) simply has no basis in the statute. Such an important, affirmative decision to exclude a delivery mode from the program access regime would reasonably be expected to be referenced somewhere in the legislative history. Yet, the cable industry does not and cannot point to *any* explanation of the "express choice" that they assert that Congress made, nor are they able to reference the term "terrestrial" in any part of the legislative history.

In short, there is nothing in the conference report that sheds any light on *why* the House version of Section 628 was adopted over the Senate's on this particular issue.[50] What is clear is that in adopting the formulation, Congress did not intend to penalize alternative MVPDs or reward cable monopolists for adaptations of programming distribution technology that would allow cable operators to evade the rules.

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49 Cablevision Comments at 16; *see* NCTA Comments at 13-14.

50 *See* Ameritech Comments at 24 (finding "nothing in the plain language of Section 628 or in its legislative history to suggest any policy reason for limiting the reach of the provision to satellite technology").

1. <u>Congress's Use Of The Term "Satellite Cable Programming"</u>

Where legislative history indicates that the question at issue was not confronted in a straightforward and decisive manner, courts tread lightly in drawing inferences from it.[51] If no affirmative Congressional view of the issue emerges from the legislative history, even in spite of a seeming endorsement of one viewpoint, courts, and the Commission, should hesitate to rely on inconclusive legislative history, even with respect to Congress's choice of one legislative body's version of a statute over the other's.[52] The D.C. Circuit repeatedly has made clear that "the expressio unius maxim -- that the expression of one is the exclusion of others. . . 'has little force in the administrative setting,'" where courts defer to an agency's interpretation of a statute unless Congress has directly spoken to the precise question at issue.[53] In fact, the D.C. Circuit has observed that "a congressional decision to prohibit certain activities does *not* imply an intent to disable the relevant administrative body from taking similar action with respect to activities that pose a similar danger."[54] Indeed, "'a congressional prohibition of particular conduct may actually *support* the view that the administrative entity can exercise its authority to eliminate a similar danger.'"[55] In the instant case, construing Section 628 to encompass the diversion of satellite-delivered programming would eliminate the danger that the incumbent cable industry

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51 *See National Petroleum Refiners v. FTC*, 482 F.2d 672, 686 (D.C. Cir. 1973).

52 *See United States v. American College of Physicians*, 475 U.S. 834, 846 (1986); *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1578-79 (Fed. Cir. 1995) (noting that the legislative history behind Congress's rejection of a House provision in favor of the Senate's "does not tell us what Congress had in mind" for the precise issue).

53 *Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (quoting *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991)); *see* Consumers Union Comments at 7.

54 *Texas Rural Legal Aid*, 940 F.2d at 694 (emphasis in original).

55 *Id.* (emphasis in original).

can exempt itself from the program access law.

In this regard, Comcast's observation that the statute uses the phrases "satellite cable programming" and "satellite broadcast programming" multiple times,[56] is not particularly useful in illuminating the more pertinent question of whether Congress was even aware at the time of the statute's enactment that a feasible, cost-effective way to deliver regional programming over terrestrial facilities might arise in the future.[57] Assuming Congress did not deliberately choose satellite delivery over other alternative delivery modes -- and there is no evidence that it did -- then the use of the term "satellite-delivered" should not carry the dispositive weight that the cable industry now ascribes to it.

Fairly viewed, the legislative history of Section 628 reveals only that Congress did not report upon any distinctions in the delivery modes contemplated in the two versions of the statute; it therefore does not reveal any "express choice" of satellite delivery over any other alternate delivery mode. As other parties note, the drafters may simply have seen no distinction between the two versions on this issue, for at the time all relevant programming carried by MVPDs was delivered via satellite.[58] For the cable industry to derive from the legislative history any decisive inference of the exclusion of formerly satellite-delivered programming diverted to terrestrial facilities from the term "satellite cable programming" strays well beyond the language that Congress provided.[59] As GE Americom has observed:

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56 Comcast Comments at 10.

57 *See* Ameritech Comments at 24.

58 *See* Consumers Union Comments at 7 n.3 (terrestrial delivery system not widely used in 1992); Bell Atlantic Comments at 11 ("At the time, most national and even regional programming was delivered by satellite.").

59 *See Bridgestone/Firestone, Inc. v. Pension Benefit Guaranty Corp.*, 892 F.2d 105, 109

> [I]t is clear that Congress is no way intended to penalize satellite operators or advantage terrestrial network providers when it adopted the program access rules. That issue never arose. The debates simply assume that all relevant programming is distributed by satellite, and then discuss when access rules should apply and when exemptions should be available from those rules. Hence, eliminating the "satellite penalty" is consistent with Congressional intent. Indeed, to the extent that the arbitrary "satellite penalty" does anything, it interferes with the Commission's ability to advance other public interest goals.[60]

Programming that has been diverted from satellite distribution remains the very same programming that Congress sought to make accessible to cable's competitors.[61] And the Supreme Court has recognized that, "[o]ne of the most significant advantages of the administrative process is its ability to adapt to new circumstances in a flexible manner."[62] To respond effectively to the emerging terrestrial evasion threat, the FCC should promptly issue regulations that clarify that refusing to sell to alternative MVPDs on a nondiscriminatory basis programming that has been diverted from satellite to terrestrial systems is prohibited conduct under Section 628.[63]

(D.C. Cir. 1989):

> [T]he absence of the House language in the ultimate legislation does not necessarily support appellant's argument . . . . [S]ince the Committee did not mention any differences between the distribution provisions of the final bill and the prior versions, we are not persuaded that Congress specifically intended to reject the distribution scheme proposed in the House bill.

60 GE Americom Comments at 8.

61 *See* RCN Telecom Comments at 15.

62 *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 811 (1978).

63 That Congress amended the statute in 1996 and did not address terrestrial evasion could have meant, not that Congress did not intend to proscribe the conduct, *see* Comcast Comments at 2, 4, 11, but that Congress was satisfied that the Commission would address

2. **The Commission Has Already Recognized The Importance Of Regional Programming To Competing MVPDs**

As set forth above, the dichotomy invented by the cable providers in this proceeding between "national" and "regional" programming has no basis in the Act. It is also contravenes the Commission's own recognition that regional programming -- and in particular regional sports programming -- is of tremendous importance to alternative MVPDs.

In two decisions in 1997, the Commission upheld program access discrimination complaints against Rainbow -- a Cablevision subsidiary-- both predicated on the inability of alternative MVPDs to gain nondiscriminatory access to regional sports programming.[64] Moreover, in the 1997 Report, the Commission acknowledged that a number of parties flagged regional sports programming as warranting special attention. In particular, the Commission noted that:

- during 1997, "the consolidation of a number of regional sports outlets under common ownership by Cablevision, TCI's Liberty Media Corp., News Corp., and Comcast, has created a potential rival to ESPN as a national source of sports programming";[65]

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the evasive tactics under its broad enforcement power under Section 628(b).

64 *Corporate Media Partners v. Rainbow Programming Holdings, Inc., Memorandum Opinion and Order,* File No. CSR-4873-P, DA 97-2040 (released Sept. 23, 1997); *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc., Memorandum Opinion and Order,* File No. CSR-4983-P (released July 11, 1997). Regional sports programming also is a specific category of programming covered by the federal PRIMESTAR consent decree. *United States of America v. Primestar Partners*, 1994-1 Trade Cas. (CCH) ¶70, 562 (S.D.N.Y. 1994). Section IV.C.(3)(A) of the decree prohibits PRIMESTAR MSOs, such as Comcast, from implementing direct or indirect exclusive arrangements that preclude DBS providers from obtaining access to "regional sports programming." The presence of this prohibition is further evidence of the speciousness of the cable industry's "local and regional" programming argument.

65 1997 Report at ¶ 106.

• the eight Fox/Liberty regional sports networks and seven SportsChannel regional services together will reach 55 million cable subscribers in 17 markets;[66] and

• Comcast, "which is a major supplier of cable television service in the Philadelphia market, created a regional network that will be a major supplier of cable television sports in the Philadelphia area, which will have access to programming produced by Fox Sports Net."[67]

In short, the Commission and the alternative MVPD industry have recognized that regional sports and other regional offerings are essential to alternative MVPDs' ability to compete. There simply is no Congressional intent to exempt such offerings from the program access law merely by virtue of their "regional" nature.

As regional networks proliferate and consolidate, it is clear that the cable industry intends to use terrestrial distribution as a means to replicate the exclusive dealing practices that warranted intervention by Congress and the Commission in 1992. Cablevision is brazen about this intent, arguing that exclusivity is "necessary" to ensure adequate distribution for regional offerings, and urging the Commission to "maintain the terrestrial exception to the program access rules" to allow a proliferation of cable- or terrestrial-exclusive program offerings, including exclusive regional sports arrangements.[68]

Creating the "exception" that Cablevision desires, however, would swallow the law. The Commission already has decided that in "the unique situation" presented in the

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66 *Id.*

67 1997 Report at ¶ 166.

68 Cablevision Comments at 21, 24.

program access context, where cable operators and their vertically integrated affiliates exercise market power, "exclusivity is not favored" in arrangements involving these entities, since "Congress has clearly placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that impede this entry."[69] This remains the legislative balance that Congress has struck, and the Commission should not now permit the cable industry to completely upset that balance merely by switching from one distribution mechanism to another.

IV. THE RECORD DEMONSTRATES WHY THE COMMISSION SHOULD STRENGTHEN ITS PROGRAM ACCESS COMPLAINT PROCESS

With the exception of the cable industry, all parties agree that the current program access rules should provide more incentives for cable operators and their vertically-integrated program vendors to comply with the statute. The cable interests basically take the position that, regardless of the merits of the proposed changes to the program access complaint process, there simply is no evidence of any problem with the current system, as demonstrated by the relatively few number of program access decisions to date.[70] After all, these opponents claim, a quick glance at the program lineups of DIRECTV and other non-cable MVPDs allegedly shows that the program access rules are working exactly as intended -- "competing MVPDs are able to obtain all of the programming they need,"[71] and alternative MVPDs have now acquired a "sufficient critical mass of programming"[72] such that further program access protection is unnecessary.

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69 Program Access Order, 8 FCC Rcd at 3384, ¶ 63.

70 *See* NCTA Comments at 2, 11; Time Warner Comments at 2.

71 Time Warner Comments at 3; *see also* NCTA Comments at 2, 3; Comcast Comments at 14.

72 NCTA Comments at 19; Cablevision Comments at 12.